

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHANE JOHNSON,)
) No. CV-07-0256-CI
Plaintiff,)
) ORDER GRANTING IN PART
v.) PLAINTIFF'S MOTION FOR SUMMARY
) JUDGMENT AND REMANDING FOR
MICHAEL J. ASTRUE,) ADDITIONAL PROCEEDINGS
Commissioner of Social) PURSUANT TO SENTENCE FOUR 42
Security,) U.S.C. § 405(g)
)
Defendant.)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 12, 16.) Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Stephanie Martz represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS in part** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

On April 15, 2003, Plaintiff Shane Johnson (Plaintiff) filed for disability insurance benefits (DIB) and supplemental security income benefits (SSI). (Tr. 81-83, 374-376.) Upon initial application, Plaintiff alleged disability due to pain, foot injuries, fibromyalgia,

1 rheumatoid arthritis, a leaky heart valve, and problems caused by
2 hepatitis C, with an alleged onset date of March 1, 2000. (Tr. 81,
3 374.) At the hearing, the alleged onset date was amended to March 2,
4 2003. (Tr. 486.) Benefits were denied initially and on
5 reconsideration. (Tr. 53-57, 61-63, 378-382, 384-386.) Plaintiff
6 requested a hearing before an administrative law judge (ALJ), which
7 was held before ALJ Mary Bennett Reed on November 2, 2005. (Tr. 484-
8 528.) Plaintiff, who was present and represented by counsel, and
9 vocational expert Tom Moreland, testified. The ALJ denied benefits
10 and the Appeals Council denied review. (Tr. 8-10.) The instant
11 matter is before this court pursuant to 42 U.S.C. § 405(g).

12 **STATEMENT OF THE CASE**

13 The facts of the case are set forth in detail in the transcript
14 of proceedings, and are briefly summarized here. At the time of the
15 hearing, Plaintiff was 43 years old and had earned a GED. (Tr. 488.)
16 He testified he had past work experience as a cook, bartender,
17 construction laborer, dishwasher, farm laborer, and baker's helper.
18 (Tr. 488-489.) Plaintiff acknowledged he was incarcerated from
19 November 27, 2001, through March 1, 2003. (Tr. 486.) He testified he
20 resides with his partner Terry Edwards. (Tr. 488.) Plaintiff sleeps
21 3 to 5 hours a night due to restless leg syndrome, feeling as if he is
22 unable to breathe, and paranoia. (Tr. 491.) Plaintiff testified that
23 when he used drugs he used marijuana and heroin. (*Id.*) He testified
24 that he can walk for 20 to 30 minutes and stand 15 to 20 minutes
25 because his heels ache and his feet swell. (Tr. 492.) Plaintiff has
26 low back pain and can lift 15 to 20 pounds. (Tr. 492-493.) He
27 testified that he has not consumed alcohol or non-prescribed drugs

1 since being released from prison. (Tr. 494.) He has lost jobs due to
2 problems interacting with co-workers and supervisors and has moderate
3 problems interacting with the public. (Tr. 494-495.) Plaintiff took
4 prescribed anti-depressant medication throughout his incarceration.
5 (Tr. 504-505.)

6 ADMINISTRATIVE DECISION

7 ALJ Reed found Plaintiff met the insured status requirements for
8 DIB through December 31, 2004. (Tr. 28-29.) At step one of the
9 sequential evaluation, the ALJ found Plaintiff had not engaged in
10 substantial gainful activity since the amended onset date of March 2,
11 2003. (Tr. 29-30.) At steps two and three, she found Plaintiff
12 suffered from the severe impairments of "post-status heel and toe
13 fractures, fibromyalgia and hepatitis C" (Tr. 30), but these
14 impairments alone or in combination did not meet or equal one of the
15 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations
16 No. 4 (Listings). (Tr. 32.) At step two, the ALJ found Plaintiff's
17 "medically indicated depressive and anxiety disorders, and mild
18 tricuspid regurgitation are 'not severe' impairments." (Tr. 30.) ALJ
19 Reed found Plaintiff not fully credible. (Tr. 31.) At step four, she
20 determined Plaintiff had the following residual functional capacity
21 (RFC) to perform a broad range of light work:

22 [The claimant] can occasionally balance, stoop, kneel,
23 crouch, and crawl, but no climbing ropes, ladders or
24 scaffolds. He can lift 20 pounds occasionally and 10 pounds
25 frequently, and he has a standing and/or walking capacity of
at least six hours out of an 8 hour day, and a sitting
capacity of 6 out of an 8 hour workday, with normal breaks.

26 (Tr. 32-33.)

27 At step four, based on vocational expert testimony, the ALJ
28

1 determined Plaintiff could perform his past relevant work as a
2 bartender. (Tr. 34.) Therefore, Plaintiff was not found "disabled"
3 as defined in the Social Security Act at any time through the date of
4 the ALJ decision. (Tr. 35.)

5 STANDARD OF REVIEW

6 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
7 court set out the standard of review:

8 A district court's order upholding the Commissioner's
9 denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211
10 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
11 Commissioner may be reversed only if it is not supported by
12 substantial evidence or if it is based on legal error.
13 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
14 Substantial evidence is defined as being more than a mere
15 scintilla, but less than a preponderance. *Id.* at 1098. Put
16 another way, substantial evidence is such relevant evidence
17 as a reasonable mind might accept as adequate to support a
18 conclusion. *Richardson v. Perales*, 402 U.S. 389, 401
19 (1971). If the evidence is susceptible to more than one
20 rational interpretation, the court may not substitute its
21 judgment for that of the Commissioner. *Tackett*, 180 F.3d at
22 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d
23 595, 599 (9th Cir. 1999).

24 The ALJ is responsible for determining credibility,
25 resolving conflicts in medical testimony, and resolving
26 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
27 Cir. 1995). The ALJ's determinations of law are reviewed *de*
28 *novo*, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment" which
28 prevents one from engaging "in any substantial gainful
activity" and is expected to result in death or last "for a
continuous period of not less than 12 months." 42 U.S.C. §
423(d)(1)(A). Such an impairment must result from

1 "anatomical, physiological, or psychological abnormalities
2 which are demonstrable by medically acceptable clinical and
3 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).
4 The Act also provides that a claimant will be eligible for
5 benefits only if his impairments "are of such severity that
6 he is not only unable to do his previous work but cannot,
7 considering his age, education and work experience, engage
8 in any other kind of substantial gainful work which exists
9 in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A).
10 Thus, the definition of disability consists of both medical
11 and vocational components.

12 In evaluating whether a claimant suffers from a
13 disability, an ALJ must apply a five-step sequential inquiry
14 addressing both components of the definition, until a
15 question is answered affirmatively or negatively in such a
16 way that an ultimate determination can be made. 20 C.F.R. §§
17 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the
18 burden of proving that [s]he is disabled." *Meanel v. Apfel*,
19 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the
20 presentation of "complete and detailed objective medical
21 reports of h[is] condition from licensed medical
22 professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b),
23 404.1513(d)).

24 It is the role of the trier of fact, not this court, to resolve
25 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
26 supports more than one rational interpretation, the court may not
27 substitute its judgment for that of the Commissioner. *Tackett*, 180
28 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
If there is substantial evidence to support the administrative
findings, or if there is conflicting evidence that will support a
finding of either disability or non-disability, the finding of the
Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
1230 (9th Cir. 1987). Nevertheless, a decision supported by
substantial evidence will still be set aside if the proper legal
standards were not applied in weighing the evidence and making the
decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d
432, 433 (9th Cir. 1988).

1 Plaintiff has the burden of showing that drug and alcohol
2 addiction (DAA) is not a contributing material factor to disability.
3 *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001). The Social
4 Security Act bars payment of benefits when drug addiction and/or
5 alcoholism is a contributing factor material to a disability claim.
6 42 U.S.C. §§ 423(d)(2)(C) and 1382 (a)(3)(J); *Sousa v. Callahan*, 143
7 F.3d 1240, 1245 (9th Cir. 1998). If there is evidence of DAA and the
8 individual succeeds in proving disability, the Commissioner must
9 determine whether the DAA is material to the determination of
10 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds that
11 the claimant is not disabled, then the claimant is not entitled to
12 benefits and there is no need to proceed with the analysis to
13 determine whether alcoholism or drug abuse is a contributing factor
14 material to disability. However, if the ALJ finds that the claimant
15 is disabled and there is medical evidence of drug addiction or
16 alcoholism, then the ALJ must proceed to determine if the claimant
17 would be disabled if he or she stopped using alcohol or drugs.
18 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

19 ISSUES

20 The question is whether the ALJ's decision is supported by
21 substantial evidence and free of legal error. Specifically, Plaintiff
22 assigns error to the ALJ's evaluation of the medical evidence and
23 credibility. The first issue is dispositive.

24 DISCUSSION

25 A. Weighing Medical Evidence

26 Plaintiff alleges that the ALJ improperly weighed the medical
27 evidence, including finding no severe mental impairment at step two.

1 (Ct. Rec. 13 at 9-14.) The Commissioner responds that the ALJ's
2 determinations are based on substantial evidence and should be
3 affirmed. (Ct. Rec. 17 at 13-17) (physical impairments) and (Ct. Rec.
4 17 at 18-25) (mental impairments and credibility).

5 In social security proceedings, the claimant must prove the
6 existence of a physical or mental impairment by providing medical
7 evidence consisting of signs, symptoms, and laboratory findings; the
8 claimant's own statement of symptoms alone will not suffice. 20
9 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
10 the basis of a medically determinable impairment which can be shown to
11 be the cause of the symptoms. 20 C.F.R. § 4416.929. Once medical
12 evidence of an underlying impairment has been shown, medical findings
13 are not required to support the alleged severity of the symptoms.
14 *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

15 A treating or examining physician's opinion is given more weight
16 than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d
17 587, 592 (9th Cir. 2004). If the treating or examining physician's
18 opinions are not contradicted, they can be rejected only with clear
19 and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
20 1996). If contradicted, the ALJ may reject an opinion if he states
21 specific, legitimate reasons that are supported by substantial
22 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
23 1453, 1463 (9th Cir. 1995). In addition to medical reports in the
24 record, the analysis and opinion of a non-examining medical expert
25 selected by the ALJ may be helpful to the adjudication. *Andrews v.*
26 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995) (citing *Magallanes v.*
27 *Bowen*, 881 F.2d 747, 753 (9th Cir. 1989)). Testimony of a medical

1 expert may serve as substantial evidence when supported by other
2 evidence in the record. *Id.*

3 Plaintiff alleges the ALJ erred by finding that his mental
4 impairments are not severe. (Ct. Rec. 13 at 7, 9-12.) The
5 Commissioner responds that the ALJ properly weighed the evidence when
6 she reached this conclusion. (Ct. Rec. 17 at 11-23.)

7 An impairment or combination of impairments may be found "not
8 severe only if the evidence establishes a slight abnormality that has
9 no more than a minimal effect on an individual's ability to work."
10 *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005) (citing *Smolen*
11 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996); see *Yuckert v. Bowen*,
12 841 F.2d 303, 306 (9th Cir. 1988). If an adjudicator is unable to
13 determine clearly the effect of an impairment or combination of
14 impairments on the individual's ability to do basic work activities,
15 the sequential evaluation should not end with the not severe
16 evaluation step. S.S.R. No. 85-28 (1985). Step two, then, is a "de
17 minimus screening device [used] to dispose of groundless claims,"
18 *Smolen*, 80 F.3d at 1290, and an ALJ may find that a claimant lacks a
19 medically severe impairment or combination of impairments only when
20 the conclusion is "clearly established by medical evidence." S.S.R.
21 85-28. The question on review is whether the ALJ had substantial
22 evidence to find that the medical evidence clearly established that
23 the claimant did not have a medically severe impairment or combination
24 of impairments. *Webb*, 433 F.3d at 687; see also *Yuckert*, 841 F.2d at
25 306.

26 Several records relate to Plaintiff's mental impairments both
27 before and, more significantly, after the onset date of March 2, 2003.

1 On November 6, 2001, treating physician J. Tucker Neilson, M.D.,
2 opined that Plaintiff "seems emotionally unfit to be in any employment
3 at this time." (Tr. 316.) The ALJ properly gave this opinion little
4 weight because Dr. Neilson admitted his evaluation was incomplete,
5 Plaintiff was noncompliant with evaluation instructions, and he had
6 only treated Plaintiff for three months. (Tr. 30.) The ALJ also
7 observed that, following this opinion, Plaintiff did not return to Dr.
8 Neilson for eighteen months. Each is a specific and legitimate reason
9 supported by substantial evidence.

10 Plaintiff was incarcerated until March 1, 2003. While
11 incarcerated, Plaintiff was given several psychotropic medications for
12 his mental impairments, including prozac, trazadone, and effexor. (Tr.
13 401-408.) These records were submitted to the Appeals Council but not
14 to the ALJ. (Tr. 7A.)

15 In an evaluation dated September 9, 2003 (six months after
16 onset), Daryl Birney, Ph.D., evaluated Plaintiff and diagnosed
17 depressive disorder, NOS, anxiety disorder, NOS, and alcohol, cocaine,
18 and opioid dependence in sustained full remission. (Tr. 335.) Dr.
19 Birney opined that Plaintiff has some problems with depression and
20 with anxiety. (*Id.*) He assessed a current GAF of 60, the same GAF as
21 Plaintiff's highest estimated in the past year.¹ (*Id.*) Contrary to
22 the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, the ALJ opined that

23
24 ¹A GAF of 60 indicates moderate symptoms (e.g., flat affect and
25 circumstantial speech, occasional panic attacks) or moderate
26 difficulty in social, occupational, or school functioning (e.g., few
27 friends, conflicts with peers and co-workers). DIAGNOSTIC AND
28 STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Ed., (DSM-IV), at 32.

1 the assessed GAF of 60 indicates "only very low moderate symptoms or
2 difficulty in occupational functioning." (Tr. 31.) The ALJ notes Dr.
3 Birney's opinion, "based on [his] very brief exam," that Plaintiff
4 appeared of average intellect with good comprehension, was able to do
5 calculations, had good recall, and although Plaintiff reported a
6 diagnosis of depression, "he did not endorse having any significant
7 depressive and anxiety-related symptomology at that time; and he was
8 not found to have any significant deficits in his mental functioning."
9 (Tr. 31.) This is the extent of the ALJ's analysis of Dr. Birney's
10 opinion.

11 Nearly two years after onset, on March 1, 2005, Plaintiff was
12 evaluated by Debra D. Brown, Ph.D. (Tr. 352-359.) Dr. Brown
13 ultimately opined that Plaintiff will be able to work, but she
14 assessed moderate limitations in several areas of functioning: the
15 ability to exercise judgment and make decisions; interact and relate
16 appropriately with supervisors, the public, and co-workers; respond
17 appropriately to and tolerate the pressures and expectations of a
18 normal work place, and control physical or motor movements and
19 maintain appropriate behavior. (Tr. 357-358.) She assessed
20 personality disorder NOS, with borderline, antisocial, and paranoid
21 traits. (Tr. 355.) The ALJ rejected Dr. Brown's assessed limitations
22 as:

23 [N]ot supported by her own report or other evidence of
24 record. First, it is noted that this was an isolated one-
25 time examination, and by her own report, he over-reported on
26 his personality assessment index (PAI), and therefore, no
27 assessment should be made based on his subjective reporting,
28 since he is not credible. The undersigned further notes
that his only arrests were alcohol and drug related, and
that since his release (and discontinuance of substance
abuse) he has had no other arrests, which cast doubt on
limitations based on a severe personality disorder. The

1 claimant testified to leaving jobs because he moved or the
2 business closed down, and specifically denied any
3 interpersonal conflicts with supervisors and co-workers,
4 which would not be consistent with the limitations assessed
5 by Dr. Brown. He also reported having no difficulty living
6 with 12 other tenants at a restoration treatment house, and
7 that because he was a model peer, he got to stay longer than
8 the [usual] 12 months He further reported having no
9 disciplinary problems while in prison and he has been able
10 to maintain a relationship with his girlfriend He
11 also testified that he attended AA after his release, . . .
12 for upwards of 90 sessions a month, which further
13 demonstrates his ability to interact with others without
14 difficulty. She also assessed a limitation in exercising
15 judgment, however, that appears to be solely related to his
16 substance abuse and behavior when using. . . .

17 . . . The undersigned further notes that personality
18 disorders are generally long-standing in nature, and given
19 the claimant's demonstrated ability to work in the past, as
20 well as the above analysis, any limitations indicated by Dr.
21 Brown are rejected as not supported. It should also be
22 noted that despite the claimant's reports of sobriety, he
23 did drink just two days before this March 1, 2005
24 evaluation.

25 (Tr. 31-32.) The ALJ went on to adopt the agency psychologists'
26 opinion that Plaintiff's mental impairments are not severe. (Tr. 33.)

27 The medical evidence does not clearly support the ALJ's step two
28 finding with respect to the severity of Plaintiff's mental
impairments. As noted, impairments should not be rejected at step two
as non-severe unless the medical evidence clearly establishes only a
slight abnormality that has no more than a minimal effect on an
individual's ability to work. With the exception of the consulting
psychologists, all of the psychologists who evaluated Plaintiff found
more than a slight abnormality in mental functioning.

29 **B. Remedy**

30 Having reviewed the record and the ALJ's conclusions, this court
31 finds that the ALJ's decision at step two that Plaintiff does not have
32 a mental impairment or has one that is non-severe is not clearly

1 supported by the medical evidence. Because the ALJ committed this
2 error at step two, the case is remanded for further proceedings. The
3 court expresses no opinion as to what the ultimate outcome on remand
4 will or should be. On remand, the ALJ will conduct a new sequential
5 evaluation, including determining at step two whether Plaintiff
6 suffers from a severe mental impairment, alone or in combination with
7 Plaintiff's other impairments. The ALJ should consider the record in
8 its entirety, including medical and other opinions. If Plaintiff is
9 found disabled, the ALJ must conduct an analysis pursuant to
10 *Bustamante v. Massanari*, 272 F.3d 949 (9th Cir. 2001), to determine the
11 effects of substance abuse. Accordingly,

12 **IT IS ORDERED:**

13 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 12**) is
14 **GRANTED in part.** The matter is remanded to the Commissioner for
15 additional proceedings pursuant to sentence four 42 U.S.C. 405(g).

16 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is
17 **DENIED.**

18 3. An application for attorney fees may be filed by separate
19 motion.

20 The District Court Executive is directed to file this Order and
21 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
22 be entered for Plaintiff and the file shall be **CLOSED.**

23 DATED May 28, 2008.

24
25 S/ CYNTHIA IMBROGNO
26 UNITED STATES MAGISTRATE JUDGE
27
28